STATE OF MICHIGAN

COURT OF APPEALS

DAVID ST. AMANT,

Plaintiff-Appellant-Counter-Defendant,

v

CITY OF TAYLOR,

Defendant-Appellee-Counter-Plaintiff.

UNPUBLISHED
April 12, 2005

No. 252656
Wayne Circuit Court
LC No. 02-223628-CE

Before: Fort Hood, P.J., and Griffin and Donofrio, JJ.

PER CURIAM.

In response to two ordinance violation citations issued in 2000 and 2002, plaintiff David St. Amant filed the present suit seeking to prevent defendant City of Taylor (the City) from enforcing its parking and use ordinances against him. Plaintiff now appeals as of right from the trial court's order denying his motion for summary disposition and granting summary disposition in favor of defendant City. We affirm.

I

The central issue in this case is whether plaintiff is illegally operating a commercial business on his residentially-zoned property. In 1990, plaintiff and his wife purchased property located at 26058 Belledale (the property) in the City of Taylor. The property consists of two acres of land with a small house on the acre closest to the street. At the time of the purchase, the property was located in a residential zoning district, zoned "R-1C." That zoning has not changed; according to the city planning director, since the adoption of the City's zoning ordinance in 1960, the property has always been zoned for residential use, although many years ago the actual classification was a combined agricultural/residential use.

From the time of their purchase until sometime in 1995, plaintiff and his wife used the property solely for residential purposes. In 1995, plaintiff commenced a commercial business called R & D Trucking, and, in February 1995, he and his wife filed a "Certificate of Conducting Business Under An Assumed Name" with the Wayne County Clerk, in which they stated, "I/We own, conduct or transact business or maintain an office or place of business in the City/Township of Taylor, Michigan, under the name of: R & D Trucking." The certificate listed the disputed property (26058 Belledale) as the "business address" of R & D Trucking. In addition to this

certificate, beginning in 1995, plaintiff began filing tax returns that identified the address for R & D Trucking as 26058 Belledale, Taylor, Michigan.

At his deposition, plaintiff testified that he is self-employed and that R & D Trucking is a concrete removal and excavating business. Plaintiff contracts with cement and building companies to remove driveways before new ones are poured and to haul away the site debris. Plaintiff does not maintain an office, but exclusively sets up work for himself by use of his cell phone. Plaintiff testified that he leaves his house every day to conduct business at the job sites away from his home. In connection with his business, plaintiff owns both commercial equipment and vehicles, all of which, he acknowledges, are stored and/or parked on the property. In addition to tools and equipment, plaintiff currently parks two dump trucks, two trailers, and two skid steers on the property. According to plaintiff, the nature of his work requires him to start his business very early in the morning so that he can be at a job site by sunlight.

It is undisputed that plaintiff did not receive any permits from the City that would allow him to operate a commercial business on the residentially-zoned property or to store numerous commercial vehicles and pieces of equipment on the property. According to the affidavit of the City's ordinance officer, the City received complaints from neighbors that plaintiff started working on the property early in the morning and that he caused loud noises, dust, diesel fumes, and traffic to emanate from the property into the surrounding neighborhood. After receiving a number of these complaints, the City, in 1999, cited plaintiff for violating the City zoning ordinance by parking and storing commercial vehicles on a residentially-zoned property. Thereafter, in September 1999, plaintiff applied for a use variance with the zoning board of appeals, requesting permission to continue operating R & D Trucking on the property. However, the zoning board denied plaintiff's request for a use variance, finding that it would not be a hardship to plaintiff if he was required to move his commercial business from the property. Plaintiff did not appeal the zoning board's decision.

In December 2000, the district court found plaintiff in violation of the City's parking ordinance because plaintiff parked and stored commercial vehicles on residentially-zoned property. Again, plaintiff did not appeal this decision.

Notwithstanding the denial of plaintiff's requested use variance and the decision of the district court, plaintiff continued to operate R & D Trucking and to store and park commercial vehicles on the property. In 2002, the City issued a second offense violation to plaintiff and initiated prosecution against plaintiff in the district court. In response to that enforcement action, plaintiff filed the present complaint in Wayne Circuit Court asserting that he had a legal nonconforming right to park commercial vehicles and to operate R & D Trucking on the property. In the interest of judicial economy, the parties agreed to have the matter decided in circuit court. The City therefore agreed to dismiss its district court action without prejudice to its ability to file a counterclaim seeking enforcement of its zoning ordinances in the instant action.

The City's counterclaim asserted that plaintiff was in violation of the off-street parking requirements, and, for the first time, the City also alleged a violation of the use requirements of

the R-1C zoning district in the City's zoning ordinance.[1] Count I of the City's complaint alleged a nuisance per se as a result of plaintiff's violation of the off-street parking requirements of both the City's most recent zoning ordinance, adopted in 2000, and its predecessor, which was adopted in 1980. Section 36.01.5A of the current ordinance requires that all off-street parking in residentially-zoned areas be primarily for noncommercial vehicles. It further provides that commercial vehicles weighing less that 4,500 pounds may be parked on residential property only on designated paved areas.[2] Count II of the City's complaint alleged a nuisance per se as a result of plaintiff's violation of Article 4.00 of the City's zoning ordinance on the theory that plaintiff's commercial trucking business was not included in any of the principal permitted uses outlined in the ordinance.[3]

The parties filed cross motions for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) as to all claims and defenses. Plaintiff, in his motion, argued that the parking of

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[1] The City's zoning authority is derived from the city and village zoning act, MCL 125.581 *et seq*.

[2] Section 36.01.5A states:

> Off-street parking spaces in residentially zoned areas (R-1A, R-1B, R-1C . . .) shall meet the following standards:
>
> A. Be primarily for noncommercial vehicles. Commercial vehicles under four thousand five hundred (4,500) pounds may be parked on residential property on designated paved parking areas only.

[3] Section 4.01 of the ordinance provides that "The R-1A through R-1C, one-family residential districts are intended to provide sites for one-family detached dwellings and residentially related uses." Section 4.02 further provides that:

> In a R-1A through R-1C, One-Family Residential District, no structure or land shall be used and no structure shall be erected except for one or more of the following specified uses unless otherwise provided in this Ordinance:
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> 1. One-family detached dwellings.
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> 2. Publicly owned libraries, parks, parkways, and recreational facilities.
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> 3. Public, parochial, and other private elementary schools offering courses in general education, and not operated for profit.
>
> 4. Home occupations as defined in Section 2.02.
>
> 5. Adult foster care family homes.
>
> 6. Family day care homes.
>
> 7. Accessory structures and uses, customarily incidental to any of the above permitted uses.

commercial vehicles was not prohibited by ordinance on plaintiff's property because it was a valid nonconforming use that had been ongoing for years. Defendant, on the other hand, focused primarily on plaintiff's entire use of the residentially-zoned property for commercial purposes and asserted that plaintiff was in violation of the use requirements of the City's ordinance.

Following oral arguments, the circuit court issued an oral opinion declaring plaintiff's use of the property to be a nuisance per se, granting summary disposition in favor of defendant, and denying plaintiff's summary disposition motion. The trial court's decision addressed only the use violation; the court held that the parking violation issue became moot once the court determined that there was a use violation. In concluding that plaintiff was illegally operating a commercial business on the property, the trial court relied on a number of undisputed facts of record, including the d/b/a filing, tax records, the nature of the business itself, the parking of equipment on the property, the fact that plaintiff sought a variance from defendant's zoning board of appeals to continue his business operations at his home address, and the fact that other individuals came to the property to help drive plaintiff's vehicles to offsite locations. In the order of judgment, the circuit court granted the City's request for declaratory and injunctive relief, and ordered plaintiff to cease his commercial trucking operation on the property, including the parking and storing of his commercial vehicles, within ninety days of entry of judgment. Plaintiff filed a motion for reconsideration, which the trial court denied, and he also filed a motion for stay pending appeal, which the court granted. Plaintiff now appeals as of right.

II

This Court reviews de novo the grant or denial of a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id*. at 561; *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." When determining if there is a genuine issue as to any material fact, the trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Maiden, supra* at 120. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.;* MCR 2.116(C)(10), (G)(4).

In presenting a (C)(10) motion, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. The nonmoving party may not rely on mere allegations or denials in pleadings, but must set forth specific facts showing that a genuine issue of material fact exists. *Id*. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id*. at 363; *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). The trial court's findings of fact are reviewed for clear error, MCR 2.613(C), *Eveline Twp v H & D Trucking Co*, 181 Mich App 25, 29-30; 448 NW2d 727 (1989), but the trial court may not resolve factual disputes or determine credibility in ruling on a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Further, the interpretation of a zoning ordinance is a question of law subject to de novo review by this Court.

Burt Twp v Dep't of Natural Resources, 459 Mich 659, 662; 593 NW2d 534 (1999); *High v Cascade Hills Country Club*, 173 Mich App 622, 626; 434 NW2d 199 (1988).

III

Plaintiff first contends that the trial court clearly erred in finding that he was operating a prohibited commercial business out of his home under the City's ordinance. Plaintiff argues the proofs offered in support of his summary disposition motion disprove the indicia of a home business. For instance, plaintiff notes that he is self-employed and does not maintain an office, but exclusively sets up work for himself by use of his cell phone. He leaves his house every day to conduct his business at job sites away from his home, and then brings his vehicles home every night, as would any other tradesman, such as a plumber, carpenter, electrician, or delivery person. Plaintiff further argues that the trial court improperly disregarded typical indicia that plaintiff was not doing business on the property, such as (1) not working on the property, (2) lack of signage advertising his business, (3) not meeting customers at his house, (4) not stockpiling or storing materials on the property, (5) not maintaining an office or office hours on the property, and (6) not having other employees for his business.

However, we conclude that the trial court did not clearly err in finding that plaintiff was operating a commercial trucking business at his address, a use which is not permitted on plaintiff's residentially-zoned property. Here, Section 4.01 of the City's zoning ordinance states that "the R-1A through R-1C, one-family residential districts are intended to provide sites for one-family detached dwellings and residentially related uses." Section 36.01 of the City's zoning ordinance regulates off-street parking and requires that off-street parking spaces in residentially-zoned areas be "primarily for noncommercial vehicles." Plaintiff's actions, taken as a whole, rise to the level of a commercial use, where the circumstances unequivocally indicate that plaintiff registered the trucking business using his home address, he has continued to expand the business, he stores numerous large commercial vehicles and equipment on the property in connection with the business, he has other individuals meet him at the property to assist in driving the trucks, he often starts loading his equipment and getting ready for work before sunrise, and he unsuccessfully sought a zoning variance to continue to operate his business operations at his home address. Plaintiff's own deposition testimony and tax documents further confirm that R & D Trucking is being operated on the property. Consequently, the trial court properly concluded that plaintiff's use constituted a violation of the zoning ordinance and correctly ordered it abated pursuant to MCL 125.587.

IV

Plaintiff next argues that defendant City is precluded from enforcing the ordinances in question against him because he has a legal nonconforming use. Plaintiff notes that the property was zoned both residential and agricultural until 1960, and the 1956 zoning ordinance book clearly states that an agricultural property may have two commercial vehicles. Plaintiff contends that the City did not prohibit the parking of commercial vehicles in areas zoned R-1C until the year 2000, and the affidavits of long-time neighbors attest to the fact that the previous owners parked commercial vehicles on the property up until the time that plaintiff purchased the property in 1990. Plaintiff testified that he has owned and parked commercial vehicles on the property from the land purchase date in 1990 through the present time. Thus, plaintiff maintains that he and his predecessors had a continuous nonconforming use on the property, namely, the

parking of commercial vehicles, that predates the zoning ordinance prohibiting the same. We disagree.

Plaintiff has failed to establish that the alleged nonconforming use was ever legal or that it was continued by plaintiff in its historical manner unabated. In *Century Cellunet of Southern Michigan Cellular Ltd v Summit Twp*, 250 Mich App 543, 546-547; 655 NW2d 245 (2002), this Court explained the nature of a nonconforming use:

> "A prior nonconforming use is a vested right in the use of a particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date." *Belvidere Twp v Heinze*, 241 Mich App 324, 328; 615 NW2d 250 (2000). Generally speaking, nonconforming uses may not be expanded, and one of the goals of local zoning is the gradual elimination of nonconforming uses. *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 95; 572 NW2d 246 (1997). In *Norton Shores v Carr*, 81 Mich App 715, 720; 265 NW2d 802 (1978), this Court explained:
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> > "Expansion of a nonconforming use is severely restricted. One of the goals of zoning is the eventual elimination of nonconforming uses, so that growth and development sought by ordinances can be achieved. Generally speaking, therefore, nonconforming uses may not expand. The policy of the law is against the extension or enlargement of nonconforming uses, and zoning regulations should be strictly construed with respect to expansion.
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> > "'[I]t is the law of Michigan that the continuation of a nonconforming use must be substantially of the same size and the same essential nature as the use existing at the time of passage of a valid zoning ordinance.'"
> >
> > The nonconforming use is restricted to the area that was nonconforming at the time the ordinance was enacted. [Citations omitted.]

See also *Heath Twp v Sall*, 442 Mich 434, 439; 502 NW2d 627 (1993).

The portion of the city and village zoning act dealing with nonconforming uses, MCL 125.583a, provides that:

> (1) The lawful use of land or a structure *exactly as the land or structure existed at the time of the enactment of the ordinance* affecting that land or structure, may be continued . . . although that use or structure does not conform with the ordinance. [Emphasis added.]

"The burden of proof is upon the party asserting a right to a nonconforming use to establish the lawful and continued existence of the use at the date of the enactment of zoning laws pertaining to it." 8A McQuillin, Municipal Corporations (3d ed), § 25.188.50, p 55.

Plaintiff must therefore prove that the applicable zoning changed, but the nonconforming right to continue operating a commercial trucking business was "vested" at the time of the change. Plaintiff is unable to carry his burden of proof because the property has never been

zoned for commercial use and has never been used for a commercial purpose. As the planning director testified in her affidavit, 26058 Belledale has always been zoned either agricultural/residential or residential, and a commercial trucking operation has never been a legal use. Thus, there has never been a legal right to use the property for a commercial trucking business.

Moreover, in order to take advantage of a prior owner's nonconforming use, the continuation of that use must be substantially of the same size and the same essential nature as the use in existence at the time of passage of a valid zoning ordinance. See *Century Cellunet, supra.* Here, the previous owner of the property apparently worked as a part-time contractor and collected junk vehicles and equipment in the hope of one day making the vehicles operable. Plaintiff, on the other hand, operates a full-time commercial business from his home. Plaintiff purchased the property in 1990 and did not operate a commercial business on the property until 1995. Plaintiff has unequivocally testified that, since he started R & D Trucking in 1995, the business has grown and expanded, to the extent that he now parks two dump trucks, two skid steers, and two trailers on the property. Such expansion is considered illegal under Michigan law concerning legal nonconforming uses, and there is no evidence that plaintiff's use is substantially the same as any previous owner's uses. *Century Cellunet, supra*. Thus, the doctrine of nonconforming use rights is inapplicable to the present circumstances.

V

Plaintiff next maintains that the doctrine of laches effectively precludes defendant from enforcing the ordinances against him. Plaintiff argues that, in addition to testimony demonstrating the presence of commercial vehicles on the property since the early 1940's, he testified in his deposition that he has parked commercial vehicles on his property since 1990. He alleges that he received a warning letter from the City to remove his commercial vehicles in 1990 when he first moved into the house, but no enforcement proceedings were pursued by defendant until ten years later with the issuance of a ticket.

A trial court's application of laches is reviewed for clear error. *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 492; 608 NW2d 531 (2000). "The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against defendants." *City of Troy, supra* at 96. "In determining whether a party is guilty of laches, each case must be determined on its own particular facts." *Id.* at 97. "The defendant must prove a lack of due diligence on the part of the plaintiff resulting in some prejudice to the defendant." *Id*. "'It is the effect, rather than the fact, of the passage of time that may trigger the defense of laches.'" *Id.*, quoting *Great Lakes Gas Transmission Co v MacDonald*, 193 Mich App 571, 578; 485 NW2d 129 (1992).

Here, the record supports defendant's contention that plaintiff has failed to produce evidence that a warning letter was issued in 1990. Moreover, according to his own testimony, plaintiff's trucking business first began in 1995. The City acted on a 1999 complaint and immediately began ordinance violation proceedings against plaintiff. Defendant continued prosecuting this violation until the district court, in 2000, issued an opinion and order finding plaintiff guilty of violating the parking ordinance. Plaintiff never appealed that ruling. Only after the City filed its second notice of violation against plaintiff in 2002 did he file the present action. Plaintiff has therefore failed to demonstrate that the requisite elements of laches exist.

Neither a lack of due diligence on the part of the City nor prejudice to plaintiff are evident in the record.

VI

Plaintiff further contends that defendant City's enforcement of these particular ordinances against him violates his due process rights because the City's pattern of enforcement has been inconsistent, arbitrary, and capricious. Plaintiff argues that defendant has singled him out, while allowing dozens of other homeowners within the City to park their commercial vehicles on residential property without consequence.

A party challenging an ordinance as violative of due process has the burden to affirmatively show that the ordinance, as applied to the property, either (1) has no reasonable governmental interest being advanced (i.e., no present relationship to the public health, safety, moral, or general welfare), or (2) is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question. *Kropf v City of Sterling Heights*, 391 Mich 139, 158; 215 NW2d 179 (1974). An equal protection claim may be brought by a "class of one," where the plaintiff alleges that he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Village of Willowbrook v Olech*, 528 US 562; 120 S Ct 1073; 145 L Ed 2d 1060 (2000).

Here, plaintiff has failed to demonstrate that the City has been purely arbitrary and capricious in the enforcement of its zoning ordinance. Indeed, plaintiff does not suggest that no reasonable government interest is being advanced by defendant City through enforcement of its ordinance. *Kropf, supra*. The record indicates that defendant received a complaint about defendant's trucking operation; it is entirely reasonable for the City to insist that plaintiff cease his operation of a commercial trucking business in the middle of a residential neighborhood. Further, plaintiff has presented no evidence that he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Village of Willowbrook, supra*. Finally, where the other alleged non-complying uses are not identical to the use at issue, the question of a constitutional violation does not arise. See *Walker's Amusements, Inc v City of Lathrup Village*, 100 Mich App 36, 43; 298 NW2d 878 (1980). In the instant case, plaintiff has made no showing of identical non-complying uses. Thus, his constitutional argument is without basis in the record.

VII

Plaintiff next argues that the hardship to him caused by enforcement of the ordinances should preclude defendant from enforcing the ordinances against him. Plaintiff contends that a prior nonconforming use may be allowed to continue in order to avoid the imposition of hardship on the property owner. See *Gerrish Twp v Esber*, 201 Mich App 532, 533; 506 NW2d 588 (1993). Plaintiff complains that he would have to spend more than $3,000 per year to store his trucks offsite, not including the additional costs of insurance premiums and the possibility of property loss from theft and vandalism.

However, plaintiff's use in this case was never legal; thus, he does not have a valid nonconforming use. Consequently, the issues and equities discussed in *Gerrish Twp, supra*, are

not relevant to this case. Even disregarding the fact that plaintiff has failed to establish a legitimate prior nonconforming use, more importantly, he has failed to establish any hardship that would preclude the City from enforcing the ordinances. Plaintiff states only that he would have to expend up to $3,000 a year to store his trucks and equipment offsite. However, as noted by defendant, other business owners spend vast sums of money every year to conduct their own businesses, and while it might cost plaintiff more money to conduct his business legally, this is not a hardship sufficient to preclude the City from enforcing its ordinance.

VIII

Plaintiff's remaining arguments raised on appeal are without merit. We therefore affirm the trial court's order denying plaintiff's motion for summary disposition and granting defendant's summary disposition motion.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio